JACOB RABINDRANATH M KRISHNAN A

v.

GP AUTOBAT SDN BHD

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
HELILIAH MOHD YUSOF JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-03-218-2006]
4 FEBRUARY 2009 C

BANKRUPTCY: *Notice - Setting aside - Whether judgment went beyond purview of guarantee executed by appellant - Miscarriage of justice - Whether Court of Bankruptcy ought to go behind judgment - Principles applicable* D

BANKRUPTCY: *Notice - Setting aside - Appeal pending against judgment on basis of which notice issued - Whether judgment not final - Whether notice bad and ought to be set aside*

This was an appeal against the order of the High Court dismissing E
the appellant's application to set aside a bankruptcy notice issued by the respondent judgment creditor. Following a trial in the sessions court where both parties were represented by counsel, that court entered judgment against the appellant on a guarantee F
given as security for a loan given to the principal debtor. The appellant appealed against the sessions court's judgment, and that appeal was pending before the High Court. In the meantime, the respondent took out the bankruptcy notice under attack in this appeal. The appellant submitted that the bankruptcy notice should G
be set aside for two reasons: (i) the judgment was for too much as it went beyond the purview of the guarantee executed by the appellant, and it followed that there had been a miscarriage of justice enabling the Court of Bankruptcy to go behind the judgment in question; and (ii) since there was an appeal pending H
against the judgment on the basis of which the bankruptcy notice was issued, that judgment was not final and, hence, no bankruptcy proceedings could be instituted based upon it. The bankruptcy notice was therefore bad and ought to be set aside.

I

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The working rule is that a registrar can go behind the judgment where it is a judgment by default or compromise. He ought not go behind it, when the judgment has been given in open court against a person who is represented. Since this was a case in which the parties were represented and there was a full trial, the exception provided for in the case of *Re Flatau; Ex Parte Scotch Whisky Distillers Ltd* had no application. There was no miscarriage of justice in this instance within the meaning of that expression as employed by a Court of Bankruptcy. *Re Howell* (foll); *Re Flatau; Ex Parte Scotch Whisky Distillers Ltd* (dist). (paras 6 & 7)

(2) The second argument was utterly devoid of any merit. If the appellant were right, then in every case where there was an appeal pending no bankruptcy proceedings could be instituted. That was not common sense and certainly not the common law. The appellant had an adequate remedy. He may apply to the Court of Bankruptcy to stay the bankruptcy petition. Alternatively, such an application may be made in the appeal. However, this court had been advised by the respondent that an application for a stay of execution was made to the sessions court, the High Court and even this court, and had failed at all levels. In those circumstances there was nothing in law to prevent the respondent from instituting bankruptcy proceedings. (para 8)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap perintah Mahkamah Tinggi menolak permohonan perayu untuk mengenepikan suatu notis kebankrapan yang dikeluarkan oleh responden pemiutang penghakiman. Sesudah satu perbicaraan dalam mahkamah sesyen di mana kedua-dua pihak telah diwakili oleh peguam, mahkamah itu mencatat penghakiman terhadap perayu atas suatu gerenti yang diberi sebagai cagaran bagi satu pinjaman yang diberi kepada penghutang utama. Perayu merayu terhadap penghakiman mahkamah sesyen itu, dan rayuan itu masih belum selesai di hadapan Mahkamah Tinggi. Sementara itu, responden mengeluarkan notis kebankrapan yang dipertikaikan dalam rayuan ini. Perayu menghujahkan bahawa notis kebankrapan itu sepatutnya diketepikan atas dua sebab: (i)

penghakiman itu ialah untuk terlalu banyak kerana ia melampaui skop gerenti yang dilaksanakan oleh perayu, dan ia bererti bahawa terdapat suatu salah laksana keadilan yang membolehkan Mahkamah Kebankrapan untuk mengkaji penghakiman yang disoalkan; dan (ii) oleh kerana terdapat satu rayuan yang belum selesai terhadap penghakiman yang merupakan dasar atas mana notis kebankrapan itu dikeluarkan, bahawa penghakiman itu tidak muktamad dan, oleh itu, prosiding kebankrapan tidak sepatutnya dimulakan berdasarkannya. Notis kebankrapan itu oleh itu tidak sah dan seharusnya diketepikan.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Kanun yang dipakai ialah bahawa seseorang pendaftar boleh mengkaji suatu penghakiman di mana ia adalah sesuatu penghakiman ingkar atau kompromi. Beliau tidak seharusnya mengkajinya, apabila penghakiman itu telah disampaikan dalam mahkamah terbuka terhadap seorang yang diwakili. Oleh kerana ini merupakan satu kes di mana pihak-pihak telah diwakili dan terdapat sesuatu perbicaraan lengkap, pengecualian yang disediakan dalam kes *Re Flatau; Ex Parte Scotch Whisky Distillers Ltd* tidak terpakai. Tiada apa-apa salah laksana keadilan dalam kes semasa seperti yang dimaksudkan oleh ungkapan itu seperti yang digunakan oleh sesuatu Mahkamah Kebankrapan. *Re Howell* (diikuti); *Re Flatau; Ex Parte Scotch Whisky Distillers Ltd* (dibezakan).

(2) Hujahan kedua langsung tidak ada merit. Jika perayu merupakan betul, dalam semua kes yang ada satu rayuan yang belum selesai tiada prosiding kebankrapan yang boleh dimulakan. Itu tidak masuk akal dan nyata bukan common law. Perayu mempunyai remedi mencukup. Beliau boleh memohon kepada Mahkamah Kebankrapan untuk menggantungkan petisyen kebankrapan itu. Secara alternatif, permohonan sebegitu boleh dibuat dalam rayuan. Walau bagaimanapun, mahkamah ini telah dinasihati oleh responden bahawa sesuatu permohonan untuk penggantungan pelaksanaan telah dibuat kepada mahkamah sesyen, Mahkamah Tinggi dan juga mahkamah ini, dan telah gagal di semua peringkat. Dalam keadaan macam itu tidak ada apa-apa di sisi undang-undang untuk menghalang responden dari memulakan prosiding kebankrapan.

A **Case(s) referred to:**

Bintulu Realty Estate Sdn Bhd v. Samat Hj Othman [1993] 4 CLJ 571 HC ***(refd)***

Re Flatau; Ex Parte Scotch Whisky Distillers Ltd [1888] 22 QBD 83 ***(dist)***

Re Howell [1915] 84 LJKB 1399 ***(foll)***

B *Re Tunku Mariam Tuanku Zainal Abidin Ex Parte Arab Malaysian Finance [2007] 8 MLJ 714* ***(refd)***

For the appellant - Amarjeet Singh; M/s Zubeda & Amarjeet
For the respondent - Ong Kim Buai; M/s Dorairaj, Low & Teh

C *[Appeal from High Court, Kuala Lumpur; Bankruptcy No: D3-29-1148-2005]*

[Editor's note: For the High Court judgment, please see In re: Jacob Rabindranath Krishnan; Ex Parte: GP Autobat Sdn Bhd [2007] 1 LNS 340.]

D

Reported by Suresh Nathan

E

JUDGMENT

Gopal Sri Ram JCA delivering judgment:

[1] This is the judgment of the court.

F **[2]** This appeal is directed against an order of the High Court dismissing the appellant's application to set aside the bankruptcy notice issued by the respondent judgment creditor. The brief facts are as follows. Following a trial in the sessions court where both parties were represented by counsel, that court entered judgment G against the appellant on a guarantee given as security for a loan given to the principal debtor who is not before us in this appeal.

[3] The appellant has appealed against the judgment of sessions court and that appeal is now pending before the High Court. In the meantime, the respondent judgment creditor took out the H bankruptcy notice now under attack.

[4] In support of the appeal it has been submitted that the bankruptcy notice should be set aside for two reasons. First, because the judgment entered by the sessions court is for too I much as it goes beyond the purview of the guarantee executed by the appellant. It follows, so the argument goes, that there has

been a miscarriage of justice enabling the bankruptcy court to go behind the judgment in question. In support of this argument reliance has been placed on the decision of Richard Malanjum J (as he then was) in *Bintulu Realty Estate Sdn Bhd v. Samat Othman* [1993] 4 CLJ 571 where that learned judge has discussed several authorities on the point.

[5] The leading case on the jurisdiction of a bankruptcy court to go behind a judgment and inquire into the validity of the debt is of course *Re Flatau; Ex Parte Scotch Whisky Distillers Ltd* [1888] 22 QBD 83 where Lord Esher MR also said this at p. 85:

> It is not necessary now to repeat that, when an issue has been determined in any other Court, if evidence is brought before the Court of Bankruptcy of circumstances tending to show that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition. There is no statute which imposes any such obligation on the Court of Bankruptcy; s. 7 does no more than give a judicial discretion.

[6] In *Re Tunku Mariam bt Tuanku Zainal Abidin Ex Parte Arab Malaysian Finance* [2007] 8 MLJ 714, Vincent Ng Kim Khoay J (now JCA) had occasion to consider what Lord Esher meant by the expression "miscarriage of justice". Our learned brother referred in his judgment to *Re Howell* [1915] 84 LJKB 1399 where the court held as follows:

> I have only been troubled in this case to what is the meaning of the words 'miscarriage of justice' in *Flatau, In Re* (22 QBD 83). I think that the working rule is that the Registrar can go behind the judgment where it is a judgment by default or compromise. He ought not to go behind it, when the judgment has been given in open Court against a person who is represented.

[7] In our judgment the foregoing passage really concludes the point against the appellant. Since this was the case in which parties were represented and there was a full trial, the exception provided for in *Re Flatau* has no application. To reiterate, there was here no miscarriage of justice within the meaning of that expression as employed by a court of bankruptcy.

[8] That brings us to the second argument. It has been submitted that since there is an appeal pending against the judgment on the basis of which the impugned bankruptcy notice was issued, that judgment is not final. Hence no bankruptcy proceedings could be instituted based upon it. The bankruptcy notice is therefore bad and ought to be set aside. With respect we find this argument utterly devoid of any merit. If the appellant is right then in every case where there is an appeal pending no bankruptcy proceedings may be instituted. That is not common sense and certainly not the common law. In our view the appellant has an adequate remedy. He may apply to the bankruptcy court to stay the bankruptcy petition. Alternatively, such an application may be made in the appeal. But we have been advised by learned counsel for the respondent that an application for a stay of execution was made to the sessions court, to the High Court and even to this court and that it failed at all levels. In those circumstances there is nothing in law to prevent the respondent to institute bankruptcy proceedings.

[9] For the reasons already given, this appeal cannot succeed. It is dismissed with costs. The deposit in court shall be paid out to the respondent to account of its taxed costs. The orders of the High Court are affirmed.